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JAMES H. McKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 409.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

DAVID G. BAIRD ET AL.,
Appellees.

BRIEF ON MOTION TO DISMISS APPEAL.

GEO. F. BROWNELL,
ADELBERT MOOT,
Attorneys for the Appellees
G. A. Richardson and E. B. Sturges.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1903. No. 409.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs

DAVID G. BAIRD ET AL.,
Appellees.

Brief on motion to Dismiss appeal on behalf of the appellees G. A. Richardson and E. B. Sturges.

Statement.

This cause comes to this court upon an appeal taken direct to the Supreme Court of the United States from an order of the Circuit Court of the United States for the Southern District of New York, in a proceeding before said Court, brought on the petition of the Interstate Commerce Commission to procure an order requiring the appellees—witnesses before said Commission—to produce certain documents and to answer certain questions in a proceeding then pending before said Commission, wherein William Randolph Hearst was the petitioner and complainant,

and the Philadelphia & Reading Railway Co. and nine other coal carrying railroads were defendants.

Upon the hearing before the court on the 10th day of June, 1903, all of the proceedings had and evidence produced before the Commission up to that time, were considered and it was ordered that the petition be dismissed (Record P. 832–37). From that order this appeal has been taken. (Record 838). Subsequently the proceeding was continued before the Commission. The complainant finished his case, the defendants introduced evidence, the case was finally closed, and since that time has been held from time to time awaiting final argument before the Commission. But one petition was filed covering the cases against the several defendants, and although in the decision at the Circuit Court it was stated (Record, p. 832) that "separate orders, however, should be made in each case, for each case is a separate proceeding instituted in this court against the particular individual" but one order was entered in the Circuit Court (Record P. 836) and but one citation was issued against the Appellees jointly, although the Assignment of Errors deals with the several cases individually and separately.

ARGUMENT.

First. It will probably not be seriously claimed that, prior to the legislation of 1903, there existed any warrant for a direct appeal to this Court from an order of the Circuit Court in a proceeding such as the one in question.

Prior to the passage of the Act of March 3, 1891, creating and establishing the Circuit Court of Appeals, the Act to Regulate Commerce (Section 16) authorized an appeal from the final judgment or decree of the Circuit Court to the Supreme Court of the United States in certain cases. The provisions authorizing

such appeals were superseded by the Act of March 3, 1891, which had for one of its objects the vesting in the newly created Circuit Courts of Appeal, appeals from the Circuit Courts except in the few classes of cases specified in that act.

This appeal cannot be justified under the Act of March 3, 1891, upon the ground that it is in a case "that involves the construction or application of the Constitution of the United States" or in a "case in which the constitutionality of any law of the United States" is drawn in question.

To warrant a direct appeal to the Supreme Court on constitutional grounds, the constitutional question must be a real and material question in the case. It is not sufficient that a constitutional question might have been raised by the appellees had they been defeated in the Circuit Court, or that a different decision or even the same decision upon different grounds might have involved a constitutional question. The constitutional question must be actually in the case and must have been passed upon by the lower court or necessarily involved in what was decided by that court.

Muse vs. Arlington Hotel Co., 168 U. S., 430–435.
Western Union Tel. Co. vs. Ann Arbor R. R., 178 U. S., 239–243.
Lampasas vs. Bell, 180 U. S., 276–282.

The constitutional question must not only be present but it must be the controlling question.

Carter vs. Roberts, 177 U. S., 496–500.
Casey vs. Houston & Texas Cent. Ry., 150 U. S., 170–181.

Although other questions were raised on the argument, it appears from the opinion (Record, p. 832) that the only question considered by the Judge at circuit and the only question decided by the order appealed from herein was as to whether the contracts sought to be obtained and the questions asked of the

appellees were relevant to the proceeding under the complaint. It was decided that they were not, and the petition was, therefore, denied.

Second. Subsequent to the act creating the Circuit Court of Appeals two acts have been passed, under which it may be claimed a direct appeal may be taken to this Court. The first is entitled:

> "An act to expedite the hearing and determination of *suits in equity* pending or hereafter brought under the act of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies'; 'An Act to regulate commerce,' approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted."

Section 2 provides:

> "That in every *suit in equity* brought in any Circuit Court of the United States, *under any of said acts, wherein the United States is complainant,* * * * an appeal from the *final decree* of the Circuit Court will lie only to the Supreme Court."

And the question arises, is the order appealed from a *final decree* in a *suit in equity wherein the United States is complainant,* brought under the Act of February 4, 1897, or of July 2, 1890, or under "any other acts having a like purpose that may be hereafter enacted"—that is, enacted subsequent to February 11, 1903? The appellees claim that it is not. In the first place, it is to be noted that the provision of the "Expedition Act" above quoted, for a direct appeal to the Supreme Court, does not purport to apply to all proceedings which may be brought under the acts specified, but is expressly limited to appeals from *final decrees in suits in equity wherein the United States is*

complainant, such suits being deemed of sufficient public importance to warrant the allowance of a direct appeal to the Supreme Court, while appeals in other proceedings arising under the Interstate Commerce acts are not affected.

In the second place, this is not a *suit in equity* to enforce any of the provisions of the acts to regulate commerce within the contemplation of the act of February 11, 1903, but is a statutory proceeding to compel the production of certain contracts and the answering of certain questions, and is in the nature of a proceeding for contempt for failure to obey the subpœna and order of the Commission.

In the third place, this appeal is not taken from a *final decree* in any *suit*, but from an order directing witnesses to produce certain documents and answer certain questions in an investigation which was being conducted by the Interstate Commerce Commission, and, furthermore, this proceeding is not brought under either of the acts specified, nor under any act passed subsequent to February 11, 1903, but under acts passed *prior to that date*, which acts amended one of the acts specified. These amendments, although in force on February 11, 1903, are not mentioned in the act in question, and, therefore, it must have been intended that *proceedings under such amendments should be excluded from its operation.*

Third. It may be claimed that the Act of February 19, 1903, entitled:

> "An act to further regulate commerce with foreign nations and among the States,"

authorizes this appeal to be taken directly to this Court. Section 3 of that act provides that the Interstate Commerce Commission may commence proceedings against common carriers by presenting its petition to the Circuit Court of the United States, sitting

in equity, which suits it shall be the duty of the District-Attorney of the United States to conduct whenever the Attorney-General shall so direct, and in such proceedings said Courts shall have the power to compel the production of books and papers and the answering of questions relative to the transaction in question :

> "*Provided* that the provisions of an act entitled 'An Act to expedite the hearing and determination of *suits in*equity, &c.'" (being the Act of February 11, 1903, above mentioned), "shall apply to any case prosecuted under the direction of the Attorney-General, in the name of the Interstate Commerce Commission."

The Act of February 11, 1903, applied only to certain *suits in equity, wherein the United States is complainant.* Section 3 of the Act of February 19, 1903, provides for the bringing of certain suits before the *Circuit Court sitting in equity,* which are to be prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission.

Section 1 of the Act of February 19, 1903, provides for other classes of cases not suits in equity, and not of the kind covered by the Expedition Act of February 11, 1903.

It would, therefore, seem clear that the proviso extending the provisions of the Act of February 11, 1903, to "any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission" was intended to extend these provisions only to those *cases in equity in which the Interstate Commerce Commission was complainant,* as provided in the fore part of the same section, thus placing on the same basis cases in equity brought to enforce the provisions of the Interstate Commerce acts, whether suits in equity wherein the United States is complainant, as provided in the Act of February 11, 1903, or suits before the Circuit Court sitting in equity

wherein the Interstate Commerce Commission shall be complainant, as provided in the Act of February 19, 1903.

If it should be held that by virtue of this *proviso* the provisions of the Expedition Act were extended to proceedings to require the attendance and testimony of witnesses and production of papers, under Section 12 of the Act to Regulate Commerce. The anomalous result would follow that the existence of the right of direct appeal to this Court would depend upon which party invoked the aid of the Court, and what counsel was employed, since the aid of the Circuit Court in any such case may be invoked by any party to the proceeding before the Commission, or by the Commission represented by private counsel, or by the Commission represented by the United States District Attorney. Even under the construction contended for by the appellant, the right of direct appeal could exist only in the last of these three cases.

The clause of Section 3 of the Act of February 19th is in the form of a proviso. The ordinary purpose of a proviso in a statute is to qualify or restrict the statute, or the particular section thereof to which it is attached.

Sutherland on Statutory Construction, Sec. 223.
Minis vs. United States, 15 Peters, 423.
Savings Bank vs. United States, 19 Wall., 227–236.

It is ordinarily applicable only to such statute or section, and should be construed with reference thereto.

Lehigh vs. Meyer, 102 Pa. St., 479.

It will not be deemed from doubtful words to be intended to enlarge or extend the act or provision on which it is engrafted.

In re Webb, 24 How. Pr., 247-249.

The form used indicates that the clause is intended to apply only to the section to which it is attached,

namely, Section 3 of the Act of February 19th, which does not cover a proceeding such as that in which the order appealed from was made.

Independently of the use of the form of a proviso, the very position of the clause at the end of Section 3, in view of the fact that proceedings in the name of the Interstate Commerce Commission under the direction of the Attorney-General are referred to in the preceding portion of the section indicates that the reference to such provisions in the proviso is intended to include only such proceedings as are covered by the preceding portion of the section.

Any doubt that this is the meaning and effect of this proviso will be removed by considering the history of the then existing legislation and the purpose which Congress may be presumed to have had in adding this provision. The Interstate Commerce Act was passed in 1887. Subsequently and in 1891 the Circuit Courts of Appeals were created, and thereafter appeals, except in certain specified cases, went to those Courts. Certain cases arising under the Interstate Commerce Act and under the Act of July 2, 1890, were recognized as of great public importance, and for the purpose of facilitating their speedy determination by the Supreme Court, the Act of February 11, 1903, known as the "expedition act" was passed. This act singled out a class of cases under the Interstate Commerce Acts which were deemed of especial public importance, and provided that in such cases which were described as *suits in equity*, brought under the Acts of July 2, 1890, or February 4, 1887, or any other acts having a like purpose, that might be thereafter enacted *wherein the United States was complainant*, an appeal from the *final decree* of the Circuit Court might be taken direct to the Supreme Court. Having provided for a speedy hearing and a direct appeal to the Supreme Court in certain important cases which were specifically mentioned in the act, it is not to be presumed that Congress also intended to place upon the Supreme Court the burden of hearing appeals in other

and less important proceedings, but rather that such appeals should still be taken to the Circuit Courts of Appeals in accordance with the policy of relieving the Supreme Court under which the Circuit Courts of Appeals were created. Thereafter and on February 19, 1903, Congress passed another act. This new act provided for suits before the Circuit Court sitting in equity to enforce provisions of the Interstate Commerce Acts, which suits should be prosecuted by the Attorney-General upon the petition of the Interstate Commerce Commission. It was an "Act having a like purpose thereafter enacted" within the terms of the Act of February 11, 1903, and in order to make it perfectly clear that the expedition act applied to these suits the proviso in question was added.

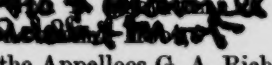
The two acts were under consideration by Congress at substantially the same time, and are part of the same scheme of legislation, and an examination of the whole act and the words used shows clearly that Congress did not intend by this proviso to extend the general scope of the "expedition act," or to accomplish any other purpose than to make it clear that the Act of February 11, 1903, applied to the *suits in equity* mentioned in the new act.

It is provided that the "expedition act" "shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission." The word case is evidently used as synonomous with suit, referring to the suits in equity mentioned in the act. The words case and suit are used interchangeably in the Interstate Commerce Acts; for example, in the Act of February 11, 1903, Section 1, line 3, refers to *any suit*, and subsequently, in the same section, the same suit is referred to as *the case* and as *such case*. In construing a statute the meaning of particular words may be inferred from earlier statutes in which the same words have been used where the intent was more obvious.

See Sutherland on Statutory Construction, S. 229.

It is further to be noted that the Act of February 19, 1903, provides for proceedings to enforce provisions of the Interstate Commerce Acts (see Sec. 1) other than the suits in equity prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission. These other cases belong to classes which were not brought within the scope of the " expedition act " at the time that act was passed and in order to exclude such cases and carry out the general plan theretofore adopted it was provided that the expedition act should apply not to all cases covered by the act of February 19, 1903, but only to such of the cases provided for by that act as were prosecuted by the Attorney-General in the name of the Interstate Commerce Commission, thereby describing the suits in equity mentioned in the preceding portion of the section.

Fourth. It appearing that there is no warrant in law for a direct appeal to this court in this proceeding under the Acts of March 3, 1891, of February 11, 1903, or of February 19, 1903, and as these are the only acts which have any bearing upon appeals of this character, it is respectfully submitted that the motion of the appellees should be granted and the appeal dismissed.



Attorneys for the Appellees G. A. Richardson and E. B. Sturges.

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JAMES H. McKENNEY,
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SUPREME COURT OF THE UNITED STATES.

October Term, 1903. No. 409.

The Interstate Commerce Commission, Appellant,

vs.

David G. Baird, Fred F. Chambers, George O. Waterman, et al.

NOTICE OF MOTION TO DISMISS APPEAL.

To the Attorney General of the United States, Hon. Henry M. Hoyt, Solicitor General, Henry L. Burnett, Esq., U. S. District Attorney, Attorneys for Appellant.

GENTLEMEN:—Please take notice that the Appellees below named will on Monday the 7th day of March, next, (1904), or as soon thereafter as counsel can be heard, present to the Court a motion to dismiss the appeal herein, a copy whereof and of the appellees' brief thereon are attached hereto.

J. D. CAMPBELL,
Attorney for George F. Baer and William G. Brown, Appellees.

ROBERT THORNE,
R. W. DEFOREST,
Attorneys for George O. Waterman, Appellee.

FRANCIS I. GOWEN,
F. H. JANVIER,
JOHN G. JOHNSON,
Attorneys for E. B. Thomas and David G. Baird, Appellees.

SUPREME COURT OF THE UNITED STATES.

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MOTION TO DISMISS APPEAL.

Now come the appellees below named and move the court that the above-entitled appeal, which is taken direct to this court from the order of the Circuit Court of the United States for the Southern District of New York, be dismissed for the reason that the same is not cognizable in this court, but should have been taken to the Circuit Court of Appeals.

J. D. CAMPBELL,
Attorney for George F. Baer and William G. Brown, Appellees.

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Attorneys for George O. Waterman, Appellee.

FRANCIS I. GOWEN,
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